No. 13871

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GEORGE LUCKMAN,

Appellant,

vs.

JOHN P. BOYD, District Director, Immigration and Naturalization,

Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE WILLIAM J. LINDBERG, *Judge*

BRIEF OF APPELLEE

CHARLES P. MORIARTY
United States Attorney

JOHN E. BELCHER,
Assistant United States Attorney

Office and Post Office Address:
1017 United States Court House
Seattle 4, Washington

BALLARD NEWS, SEATTLE, WASHINGTON — 10/6/53 — 45 COPIES

No. 13871

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GEORGE LUCKMAN,

Appellant,

vs.

JOHN P. BOYD, District Director, Immigration and Naturalization,

Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE WILLIAM J. LINDBERG, *Judge*

BRIEF OF APPELLEE

CHARLES P. MORIARTY
United States Attorney

JOHN E. BELCHER,
Assistant United States Attorney

Office and Post Office Address:
1017 United States Court House
Seattle 4, Washington

BALLARD NEWS, SEATTLE, WASHINGTON — 10/6/53 — 45 COPIES

INDEX

TABLE OF CASES

UNITED STATES CONSTITUTION

UNITED STATES STATUTES

UNITED STATES CODE

No. 13871

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GEORGE LUCKMAN,

Appellant,

vs.

JOHN P. BOYD, District Director, Immigration and Naturalization,

Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE WILLIAM J. LINDBERG, *Judge*

BRIEF OF APPELLEE

JUDISDICTIONAL STATEMENT

Jurisdiction of the District Court is conferred by the provisions of Section 2241, Title 28, U.S.C. and upon this court by the provisions of Section 2253, Title 28, U.S.C.

STATUTES INVOLVED

Title 8, U.S.C., Section 137 (c) (e) and (g), Act of October 1918 (40 Stat. 1012), as amended by the Act of June 5, 1920 (41 Stat. 1008), as further amended by the Act of June 28, 1940 (54 Stat. 673), provides:

> "Any alien who, at any time, shall be or shall have been a member of any one of the following classes shall be excluded from admission into the United States:
>
> * * * *
>
> (c) Aliens who are members of or affiliated with any organization, association, society, or group, that believes in, advises, advocates, or teaches: (1) the overthrow by force or violence of the Government of the United States or all forms of law * * *.
>
> (e) Aliens who are members of or affiliated with any organization, association, society, or group that writes, circulates, distributes, prints, publishes, displays, or causes to be written, circulated, distributed, printed, published, or displayed, or has in his possession for the purpose of circulation, distribution, publication, issue or display, any written or printed matter of the character described in paragraph (d).

[Paragraph (d) referred to in paragraph (e) specifies "any written or printed matter, advising, advocating, or teaching, opposition to all organized government, or advising, advocating, or teaching: (1) the overthrow by force or violence of the Govern-

ment of the United States or of all forms of law."]

* * *

(g) Any alien who was at the time of entering the United States *or has been at any time thereafter*, a member of any one of the classes of aliens enumerated in this section, shall, upon the warrant of the Attorney General, be taken into custody and deported * * *."

In appellant's "concise statement of the case" it is said:

"In view of the fact that appellant intends to urge *errors of law, on admitted facts*, it is sufficient to refer to the admitted pleadings as shown by respondent's return to show the questions involved, and the manner in which they are raised." (Italics ours)

This statement coupled with the "specification of errors" (Br. p. 5) shows that this appeal raises only two legal questions, as follows:

A. Whether past membership in the Communist Party is, as a matter of law, a sufficient ground for deportation of an alien under the provisions of Title 8, Section 137, U.S.C., as it existed prior to amendment by Section 22 of the Internal Security Act of 1950.

B. Whether the Act of June 28, 1940 (8 U.S.C. § 137) providing for deportation of aliens who, after entry, became members of an organization which advocates the overthrow of the Government of the United States by force and violence is unconstitutional in violation of the First Amendment, the due process clause

of the Fifth Amendment, and the *ex post facto* prohibitions of Art. I, Section 9, Clause 3 of the Constitution of the United States.

ARGUMENT

It is our position that all of these questions have been decided by the United States Supreme Court adversely to the contentions of appellant and are no longer in doubt.

The first question, under "A" above was squarely decided by the Supreme Court in the case of *Harisiades v. Shaughnessy*, 342 U.S. 580.

In the syllabus we find:

> "The Alien Registration Act of 1940, so far as it authorizes the deportation of a legally resident alien because of membership in the Communist Party, *even though such membership terminated before enactment of the Act*, was within the power of Congress under the Federal Constitution pp. 581-596."

That case clearly holds:

A. That the Act does not deprive the alien of liberty without due process of law in violation of the Fifth Amendment.

   (1) The power to deport aliens is inherent in every sovereign state.

   (2) The policy toward aliens is so exclusively entrusted to the political branches of the Government as to be largely immune from judicial inquiry or interference;

and it cannot be said that the power has been so unreasonably or harshly exercised by Congress in this Act as to warrant judicial interference.

(3) The fact that the Act inflicts severe hardship on the individuals affected does not render it violative of the Due Process Clause.

B. The Act does not abridge the alien's freedoms of speech and assembly in contravention of the Fifth Amendment.

C. The Act does not contravene the provision of Art. 1, Sec. 9 of the Constitution forbidding *ex post facto* laws.

(1) Procedural requirements of the Administrative Procedure Act are not mandatory as to proceedings which were instituted before the effective date of the Act.

These same questions were considered by this court in *Galvan v. Press*, (Jan. 1953) 201 F. (2d) 302, and again passed upon by the United States Supreme Court, in affirming by a divided court, the case of *Martinez v. Neelly*, 197 F. (2d) 462 (97 L.Ed. Adv. p. 275).

Counsel says the decision in the Martinez case, *supra*, is wrong because it was decided under the Internal Security Act of 1950 without any opportunity for a challenge to the constitutionality of the Internal Security Act of 1950 and without argument thereon.

The court in the case of *Martinez v. Neelly*, 197 F. (2d) 462, said at pp. 465-6:

"Congress by the Act of 1950 (Internal Security Act) expressly provided for the deportation of 'any alien who was at the time of entering the United States, or has been at any time thereafter, a member' of the Communist Party of the United States. Title 8, U.S.C.A. § 137, Pars. (1), (2), (c), (3), and § 137-3. *While we do not rest our opinion upon this recent enactment, it is apparent that plantiff is subject to deportation even though the present order be nullified.* Having admitted membership in such party, the constitutionality of the recent Act would be the only attack open to the plaintiff. However, any hope of success in this respect would appear to be a remote possibility in view of the holding of the Supreme Court in the *Harisiades* case relative to the 1940 amendment. At any rate, it certainly would be immune from any contention that it constituted an *ex post facto* law in violation of Sec. 9 of Article I of the Constitution. *Harisiades*, 342 U.S. at page 594, 72 S.Ct. 512."

The Supreme Court has since decided the constitutionality of the Internal Security Act of 1950 in the recent case of *Heikkila v. Barber*, 345 U.S. 229.

In the instant case the District Court, as in the *Harisiades* case and the *Martinez* case, decided the issues of law as the law stood prior to the enactment of the Internal Securities Act, and it would seem unnecessary to discuss the matter further, other than to say that petitions for rehearing were filed in the United States Supreme Court in the *Harisiades* case and denied 343 U.S. 936.

In the instant case the Examiner's Finding V (Ex. A) was as follows:

> "That the Communist Party of the United States during the period of the respondent's membership therein was an organization that believed in, advised, advocated and taught the overthrow by force and violence of the Government of the United States."

This finding and the finding of the Assistant Commissioners approved by the District Court was based on "substantial evidence" (R. 27, Finding VIII, R-37, Dist. Ct. memo op.).

Much argument is made in criticism of the decisions of the Supreme Court set out herein and upon which the district court's decision in this case is based, but that argument should be addressed to the Supreme Court rather than to this court.

CONCLUSION

It is respectfully submitted that all questions raised on this appeal have been definitely decided adversely to appellant's contentions and the judgment of the District Court should be affirmed.

Respectfully submitted,

CHARLES P. MORIARTY
United States Attorney

JOHN E. BELCHER
Assistant United States Attorney